

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA, et al,**

Plaintiff,

v.

Case Number: 05-CV-329-TCK-SAJ

TYSON FOODS, INC., et al,

Defendants,

TYSON FOODS, INC., et al,

Third-Party Plaintiffs,

v.

CITY OF TALEQUAH, et al ,

Third-Party Defendants.

**BRIEF IN SUPPORT OF MOTION OF THE BERRY GROUP OF THIRD-PARTY
DEFENDANTS FOR DISMISSAL, AND ALTERNATIVELY FOR SEVERANCE AND
STAY, OF THE THIRD-PARTY COMPLAINT OF DEFENDANTS/THIRD-PARTY
PLAINTIFFS, TYSON FOODS, INC., TYSON CHICKEN, INC., COBB-VANTRESS,
INC., PETERSON FARMS, INC. SIMMONS FOODS, INC., GEORGE’S, INC., AND
WILLOW BROOK FOODS, INC.**

Introduction

Plaintiffs filed this action against the defendants, referred to as Poultry Integrator Defendants, arising from their alleged improper conduct in the management and disposal of poultry waste. Plaintiffs have alleged that the defendants conduct was intentional.

After the filing of the first amended complaint, the defendants filed two third-party complaints. The defendant Cargill Turkey Production, LLC (“Cargill”) filed its third-party action against the City of Tahlequah and the City of Westville. The defendants Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc.,

George's, Inc. and Willow Brook Foods, Inc., ("Tyson") filed a third-party complaint naming 160 third-party defendants, which includes members of the Berry Group, and 150 "John Doe" third-party defendants. Tyson seeks judgment against the third-party defendants to the extent that judgment is rendered against them and in favor of the plaintiffs. The relief sought includes, injunctive relief, contribution, indemnity, actual and punitive damages, together with costs and attorneys fees. The third-party complaint alleges a wide range of activities of the third-party defendants that allegedly contributed to the damages to the Illinois River and the watershed (IRW). These activities include the operation of municipal waste water plants, septic systems, haying, grazing of livestock, lawn maintenance, and ownership, operation and maintenance of golf courses, parks, nurseries, lake marinas, float trip operations, cabins, RV parks and campgrounds. Missing from this wide range of activities are poultry operations.

In response to third-party complaint, the plaintiff State of Oklahoma ("Oklahoma") has filed a motion to sever and stay the third-party complaint or to dismiss same. Oklahoma has advanced the proposition that defendants have failed to establish viable claims against the third-party defendants for contribution or indemnity. The Berry Group agrees with Oklahoma's position and adopts Oklahoma's motion and brief (See Dkt. #247), as well as Oklahoma's reply brief and errata thereto (See Dkt. #584 & 586), and requests the Court to dismiss Tyson's third-party complaint. In this regard some of the arguments advanced may be repetitive of those stated by plaintiffs and other third-party defendants. However, since the parties making up the Berry Group are in a different position than the plaintiffs, it is also necessary to go beyond merely incorporating Oklahoma's motion and brief.

Arguments and Authorities

Tyson's Third-Party Complaint is Subject to Dismissal Due to the Lack of Viable Claims Against the Berry Group

Introduction

In the First Amended Complaint, plaintiffs seek recovery against the defendants under 10 causes of action: CERCLA Cost Recovery found at 42 U.S.C. § 9607, CERCLA Natural Resource Damages of 42 U.S.C. § 9607, Solid Waste Disposal Act (“SWDA”) Citizen Suit, State Law Nuisance, Federal Common Law Nuisance, Trespass under Oklahoma Law, Violations of Oklahoma Statutes, 27A O.S. § 2-6-105 & 2 O.S. § 2-18.1, Oklahoma Administrative Code, § 35:17-3-14 (violations of Animal Waste Management Plan) and Unjust Enrichment/Restitution/Disgorgement. Plaintiffs seek damages, imposition of fines and penalties and injunctive relief. Tyson, in turn, asserts claims against the third-party defendants for indemnity and contribution. As to the actions based on state law and federal common law, Tyson claims entitlement to contribution pursuant to 12 O.S. § 832 and/or indemnification.¹ In addition to contribution, Tyson also seeks to impose on third-party defendants injunctive relief and imposition of damages, penalties, punitive damages and costs, including attorneys fees with reference to the actions based on federal statutes if Tyson is held liable for same to Plaintiffs.²

Rule 14 (a) of the Federal Rules of Civil Procedure authorizes the assertion of a third-party complaint against a third-party “who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.” The operative section of this provision is the phrase “who is or may be liable to the third-party plaintiff.” Impleader is only proper when liability of the third-party defendant is “in some way derivative of the outcome of the main claim.” *Hefley v. Textron, Inc.* 713 F.2d 1487, 1498 (10th Cir. 1983) (citations omitted).

¹ Third-party complaint at ¶ 203.

² Third-party complaint at ¶¶ 210, 211, 215, 221 and Prayer for Relief.

Therefore, “if there is not a right to relief under the substantive law, impleader is improper.”
Ibid. Tyson’s third-party complaint fails to satisfy this requirement and is subject to dismissal.

**There is No Right to Indemnity or Contribution With Regard to Those
 Actions Based on Oklahoma Statutory or Common Law or Federal Common Law**

Included in Tyson’s third-party action is a request for indemnity. However, under Oklahoma law, indemnity requires the existence of a legal relationship between the parties. “The right to indemnity is not limited to cases where there is an express agreement to that effect. A right to implied indemnity may arise out of a contractual or a special relationship between parties and from equitable considerations. In the case of noncontractual indemnity, the right rests upon fault of another which has been imputed or constructively fastened upon him who seeks indemnity.” *Central National Bank of Poteau v. McDaniel*, 1986 OK. Civ. App. 34, 734 P. 2d 1314, 1316. The Oklahoma Supreme Court in *Porter v. Norton-Stewart Pontiac-Cadillac of Enid*, 1965 OK 18, 405 P.2d 109, 113, observed, with the reference to a question of implied indemnity, “one of the exceptions to the general rule denying indemnity as between joint tortfeasors arises when the one claiming indemnity... was only technically or constructively at fault as from a failure to perform some legal duty, and the negligent or wrongful act of the party from whom indemnity is sought was a primary and proximate cause of injury.” Tyson’s allegations do not allege the existence of a relationship. Further, there is no suggestion of constructive or vicarious liability of Tyson due to the alleged acts of the third-party defendants. Finally, the plaintiffs allege intentional acts of wrongdoing by the defendants. Indemnity is not available for intentional acts. *See, Tillman v Shofner*, 2004 OK CIV APP 40, 90 P.3d 582, 583.

Intentional wrongdoing also precludes a claim for contribution. 12 O. S. § 832 C (“There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.”). Since plaintiffs allege intentional actions of the defendants as

the cause of the damage to the IRW, defendants/third-party plaintiffs are precluded from relief from the third-party defendants.

The intentional nature of defendants' acts precludes their action for indemnity and/or contribution under the federal common law of nuisance. See, Restatement of Torts § 886A (3), *Olson v Farms, Inc. v Safeway Stores, Inc.*, 649 F.2d 1370, 1379 (10th Cir. 1979).

Plaintiffs' also allege an intentional violation of the state's statutory provisions by defendants. As noted by Oklahoma in its brief,³ it is not seeking damages for these violations. Rather, plaintiffs seek the imposition of penalties for defendant's intentional violations of the statutory schemes governing the conduct of the defendants. Neither indemnity nor contribution is available to Tyson in its third-party action.

There Is No Contribution or Indemnity For Tyson for Liability Under Federal Statutes

The Berry Group can not provide any additional authority that has not been presented to the Court by Oklahoma or other parties regarding the nature of the liability under the subject federal statutes. It therefore adopts and incorporates herein by reference Oklahoma's arguments and authorities that there is no right of indemnity or contribution for liability imposed on Tyson under plaintiff's RCRA and CERCLA claims.

Factors for Severance or Stay of Third-Party Action

Even if the Court should find the existence of a claim for relief in Tyson's third-party complaint, the Court may, in its discretion, dismiss a third-party claim. See, *Blais Construction Company, Inc. v. Hanover Square Associates*, 733 F. Supp. 149 (N.D.N.Y. 1990). In addition, Fed. R. Civ. P. 14(a) provides that a party "may move to strike the third-party claim, or for its severance or separate trial." Under Fed. R. Civ. P. 42(b), "in furtherance of convenience or to

³ See Plaintiff's motion and brief, Docket number 247, at pages 18 to 20.

avoid prejudice, or when separate trials will be conducive to expedition and economy, [the Court] may order a separate trial of any . . . third party claim.”

The decision to stay and/or sever, as in the case of dismissal, is committed “to the sound discretion of the court.” *In re CFS—Related Securities Fraud Litigation*, 213 F.R.D. 435 (N.D. Okla. 2003). In *CFS*, the Court identified several factors to be considered in determining whether to sever and/or stay the third-party action. These include judicial economy, prejudice to the third-party defendants and the original parties and the delay in asserting third-party claims against third-party defendants. 213 F.R.D. 438 to 440.

It is submitted that a consideration of judicial economy and the prejudice to the third-party defendants and the plaintiffs warrants a severance of the third-party complaints and a stay of same pending resolution of plaintiffs’ action against the Defendant Poultry Integrators.⁴

Judicial Economy is Not Promoted by the Third Party Complaints

The claimed benefits of the third-party complaints are illusory due to the simple fact that the third-party plaintiffs have not named all parties they allege are responsible to them if they are responsible to Oklahoma. In its third-party complaint, Tyson asserts that its contribution to the condition of the IRW is “insignificant in comparison to the contribution of the Third-Party Defendants and the thousands of other persons, corporations and political subdivisions operating with the IRW.”⁵ In its brief in response to the plaintiffs’ motion to sever, strike, stay and/or dismiss, Tyson asserts that it has “been forced to do what Plaintiffs will not – *i.e.* acknowledge that this litigation must include all persons and entities whose activities may directly affect the

⁴ While the third party complaint of the Cargill group of defendants is limited to two municipalities, it is submitted that it should also be stayed pending resolution of the main action. While the Berry Group is not a third-party defendant in the Cargill third party complaint, it is submitted that if the Court should sever and/or stay the Tyson third party action, that the Cargill third party complaint should receive the same treatment in order to avoid duplicative actions and the associated costs.

⁵ Third Party Complaint, Docket Number 80-1, page 10, ¶ 3.

IRW.”⁶ Tyson falls short of that goal. Its arguments that it promotes judicial efficiency and avoids prejudice to the parties is without merit since there still remains “thousands” of people and entities that are allegedly responsible for the condition of the watershed that are not parties to this litigation.

Judicial economy or efficiency means the elimination of delay and/or duplicative actions, *See, Hicks v Long Island Railroad*, 165 F.R.D. 377, 379. (E.D.N.Y. 1996). The purpose of Rule 14 is “to avoid two actions which should be tried together to save the time and cost of a re-duplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third-party defendant.” *Ibid*. Efficiency is not promoted by Tyson’s selection of a limited number of third-party defendants that are allegedly responsible. There will still be a need for a second trial to adjudicate all of those thousands of people and entities that Tyson claims contributed waste to the IRW and to adjudicate the counterclaims of Third-Party Defendants against the Third-Party Plaintiffs.

Third-Party Defendants Will Suffer Prejudice Absent a Dismissal or Stay and Severance

The Berry Group is unable to determine the criteria for Tyson’s selection of third-party defendants to represent a “cross section” of what is alleged to be essential parties.⁷ Those named suffer prejudice in that they have and will incur costs, both in time and expense, in defending against the allegations of Tyson. Since not all allegedly liable or responsible parties have been named, these same identified third-parties may be required to litigate liability and damage issues with those “thousands” of contributors to the IRW.

⁶ Defendants’ Response in Opposition to Plaintiffs’ Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third-Party Complaints and Integrated Brief in Support, Docket Number 495, page 2.

⁷ See the affidavit of Holly Berry Griffin, attached hereto as Exhibit “A.”

The watershed area of the Illinois River Basin (IRW) consists of 748 square miles (45%) in Arkansas and 897 square miles (55%) in Oklahoma. However, the population of cities in Arkansas in the IRW in the 2000 US Census was 174,691 (89%) while the population of cities in Oklahoma in the IRW was 20,623 (11%).

Three Oklahoma Municipalities (Tahlequah, Watts and Westville) were named. Seven Arkansas Municipalities (Springdale, Rogers, Siloam Springs, Fayetteville, Gentry, Prairie Grove, and Lincoln) are in the IRW but were not included.

As previously stated, the activities alleged by the Third-Party Plaintiffs to be contributing to the damage include the operation of municipal waste water plants, septic systems, haying, grazing of livestock, lawn maintenance, and ownership, operation and maintenance of golf courses, parks, nurseries, lake marinas, float trip operations, cabins, RV parks and campgrounds.

Yet, no Arkansas residents or businesses comprising 89% of the municipal population and 45% of the land area in the IRW were named. Since the Third-Party Plaintiffs have stated to the Court that they selected a “cross section,” are they representing that none of the above described activities are being conducted on the Arkansas side of the IRW by Arkansas residents and businesses? Surely not.

The foregoing strongly suggests that the Third-Party Plaintiffs intentionally omitted Arkansas residents and businesses in the IRW to the prejudice of The Berry Group and obviously for political purposes in an attempt to encourage the named Third-Party Defendants to put political pressure on the Oklahoma Attorney General to drop the proceeding.

The Court should not allow itself to be so used and for that reason alone the case should be dismissed or at least stayed until it goes away against the Third-Party Defendants.

Plaintiffs sued one industry, the Poultry Integrators. The inclusion of parties engaged in other activities that allegedly created liability will only serve to complicate and confuse the

issues. In *United States v Kramer*, 770 F.Supp. 954, 960 (D.N.J. 1991), also cited by plaintiffs, third-party contribution actions were severed from plaintiff's action. In its ruling the Court noted:

To try this case with well over 300 parties would be overwhelming due to the resulting administrative, procedural, factual, and legal complexity. Such a mass trial would also result in the unnecessary expenditure of a tremendous amount of money, time and effort on the part of hundreds of parties and the wasting of judicial resources arising out of months of discovery, motion practice and the trial itself. Determination of issues in the primary case, or a settlement, should it occur, is likely to eliminate many issues in dispute between the defendants and the third-party defendants.

In balancing the interests of efficiency and prejudice to the parties, preference is given to judicial economy over prejudice to the parties. However, the addition of a large number of parties but not all of those that Tyson claims are contributors to the pollution of the IRW, does not promote judicial efficiency of one lawsuit to resolve all claims. The identified third-parties are alleged to be engaged in a wide range of activities that allegedly pollute the waterway. The potential for separate litigation exists since not all alleged contributors are before the Court. Yet, third-party defendants suffer prejudice in terms of time and costs created by the inclusion into the difficult and scientifically complex litigation between the State of Oklahoma and the Poultry Integrators.⁸

The inclusion of a large number of third-parties engaged in other activities than those of the defendants increases the issues to be resolved by the Court. Since additional litigation is still needed to litigate the responsibility of all parties, judicial economy and convenience is not served by the third-party complaint. Absent such benefit the third-party complaint should be dismissed or severed and stayed from plaintiffs' action.

⁸ Plaintiff has also claimed prejudice by inclusion of the third-party actions. See plaintiff's motion and brief, Docket number 247, at pages 8 to 10.

Conclusion

Tyson claims the third-party actions promote judicial economy and efficiency without prejudice to plaintiff and third-party defendants. The argument may have some validity if all alleged contributors to the IRW were included. Instead, only 150 named individuals or entities and 150 John Doe entities have been included as third-party defendants. The inclusion of these parties increases the complexity and cost of the litigation without any benefit to the Court. If multiple lawsuits were a danger before the third-party complaints, such danger still exists after filing of the third-party complaints. If inconsistent verdicts existed before the filing of the third-party complaints, such danger still exists after the filing of the third-party complaints. The only thing that has been accomplished by the third-party complaints is an increase in the size, complexity and expense of the litigation. The elimination of multiple actions has not been accomplished. Plaintiffs have targeted a specific industry. The Defendants have targeted only a few vulnerable, political sensitive individuals. Defendants have alleged that thousands are responsible for the condition of the IRW and have named a few of those alleged contributors outside of the industry selected by Plaintiffs. For these reasons, the Berry Group of defendants requests this Court to dismiss the third-party complaint of Tyson or, in the alternative, to sever the third-party complaints and stay the proceedings until resolution of the plaintiffs' action against the defendants.

Respectfully submitted,

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(Signed by filing attorney with permission of Mr. DesBarres)

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May 2006, I electronically transmitted a copy of this Brief In Support of Motion of The Berry Group of Third-Party Defendants for Dismissal, and Alternatively for Severance and Stay, of The Third-Party Complaint of Defendants/Third-Party Plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's Inc. and Willow Brook Foods, Inc. to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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